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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-191520 DATE: June 6, 1978

MATTER OF: Department of the Interior -- Overtime Pay for Prevailing Rate Employees Who Negotiate Wages

DIGEST: 1. Interior Department questions whether it may pay prevailing rate employees who negotiate their wages, overtime compensation for time worked outside the employees' regular shift, even though the employees do not work more than 8 hours in a day or 40 hours in a week. Such a payment would be a form of penalty pay or a special type of overtime which is not authorized by 5 U.S.C. 5544. Since that statute would be violated, such overtime may not be paid.

2. Employee performed certain preshift and postshift duty. Arbitrator's advisory opinion considered such duty separate periods of overtime for rounding-off purposes. Since arbitrator's opinion was primarily based on invalid contractual provisions, arbitrator's opinion is not to be followed, and periods of overtime worked in 1 workday are to be aggregated to determine total overtime compensation payable.

By a letter dated March 22, 1978, the Honorable Richard R. Hite, Deputy Assistant Secretary of the Department of the Interior, requested our decision whether the Interior Department may lawfully comply with an advisory arbitration award dealing with the computation of overtime hours. In addition, our decision has been requested as to the legality of two provisions of a labor-management agreement between the Department's Bureau of Reclamation and Local 1245, International Brotherhood of Electrical Workers (IBEW), AFL-CIO. Since the opinion of the arbitrator in this matter was primarily based upon the contractual provisions in question, we will first consider the legality of those provisions.

Supplemental Labor Agreement No. 2 between the agency and the IBEW provides, in pertinent part, as follows:

"ARTICLE III
OVERTIME

"Section 1. Overtime is defined as (a) time worked in excess of forty hours in an administrative workweek, (b) time worked in excess of eight hours on a workday, (c) time worked on a non-workday except for prearranged holiday work during regular work hours, and (d) time worked outside of regular hours on a workday."

The agency states that it has no question as to the legality of subsections 1(a) and 1(b), but that it does question the legality of subsections 1(c) and 1(d) since they establish overtime entitlements beyond that authorized by 5 U.S.C. 5544 (Supp. II, 1972). Subsections 1(c) and 1(d) provide that when an employee is required to work hours outside of his regular tour of duty on either a daily or weekly basis, overtime is paid even though the employee does not work more than 8 hours in a day or 40 hours in a week. These latter provisions have been described as penalty pay, designed to penalize the employer for requiring an employee to work outside the regular tour of duty. The agency questions whether subsections 1(c) and 1(d) are valid in light of our decision in B-189782, February 3, 1978, 57 Comp. Gen. ___.

Overtime pay for prevailing rate employees, whether or not they are covered by a collective-bargaining agreement, is governed by 5 U.S.C. 5544, which provides in pertinent part as follows:

"(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours in a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime

> pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. * * *"

We have held that, with the exception of certain specified situations, overtime compensation is authorized under that statute only for periods of work as distinguished from periods of duty. B-189782, supra. The provisions of 5 U.S.C. 5544 provide clearly that overtime pay is authorized for overtime work in excess of 8 hours a day or 40 hours a week. Unless the employee works in excess of those amounts of time, there is no statutory basis for the payment of overtime pay. In this connection, one of the purposes of overtime compensation is to discourage the employer from unnecessarily requiring overtime work while providing the employee with an incentive to tolerate the added inconvenience. Kelly v. United States, 119 Ct. Cl. 197, 211 (1951), affirmed 342 U.S. 193 (1952). Thus, in B-189782, supra, we recognized that penalty pay is a special type of overtime. In that decision, we held that payments of penalty pay may not be made since 5 U.S.C. 5544 does not authorize added increments of overtime compensation for any purpose. Further, although employees exempted from coverage of the prevailing rate statute by section 9(b) of Public Law No. 93-392 may negotiate wages and benefits otherwise covered by that statute, they may not negotiate pay and benefits governed by other statutes and regulations, such as overtime pay. 56 Comp. Gen. 361 (1977). Since the provisions of 5 U.S.C. 5544 require employees to work in excess of 8 hours in a day or 40 hours in a week before overtime compensation may be paid, agencies have no authority to pay overtime when an employee is required to work outside his regular tour of duty, but does not work in excess of 8 hours in a day or 40 hours in a week.

The second question presented for our consideration concerns the correctness of the arbitrator's opinion regarding the computation of overtime hours. As noted in the arbitrator's opinion, the regular shift for the employees in question was from 7:45 a.m. to 4:15 p.m. Because of an annual overhaul of equipment, the employees were required to work overtime both before and after their regular shift. For example, on July 21, 1975, the employees were required to work from 6 a.m. to 6:30 p.m. Thus, the employees worked 1-3/4 hours before their normal shift and 2-1/4 hours after the shift. Section 2 of Article III, of Supplemental Labor Agreement No. 2 provides:

> "Overtime shall be paid for to the nearest half hour at the rate of double the basic hourly wage rate."

The parties agree that if an employee works anywhere from 1 minute through 14 minutes of overtime, he gets no overtime pay. However, if he works 15 minutes of overtime, he gets 1/2 hour overtime pay. In the situation described above, the agency added together the additional hours worked and paid the employees overtime for the total of 4 hours. The union, however, contended that the hours were worked in separate periods, and that aggregation of the hours was therefore not proper. Under the union's position, there would be a preshift payment for 2 hours of overtime (rounding 1-3/4 hours upward), a postshift payment for 2-1/2 hours of overtime, a total of 4-1/2 hours of overtime pay.

The arbitrator agreed with the union's position. It was his opinion that the overtime hours were worked in separate periods. He concluded that the preshift work was overtime pursuant to section 1(d) of Article III of the Labor Agreement, which provided for overtime pay for hours worked outside the regular shift. Likewise, he concluded that the postshift work was overtime under either section 1(b) or 1(d) of Article III. In his view, since each period of time "stands on its own," and since the contract did not provide for cumulation of overtime hours worked, the two periods of work were considered to be separate for "rounding out" purposes. The agency has questioned the correctness of this determination.

As noted above, to the extent that subsection 1(d) provides for payment of overtime pay to employees who do not work more than 8 hours in a day or 40 hours in a week, that subsection violated 5 U.S.C. 5544, and is therefore invalid. In reaching his conclusion that the overtime in question here was worked in two separate periods, the arbitrator relied, in part, upon subsection 1(d) of the contract. Since the underlying basis for the arbitrator's opinion has thus been determined to be invalid, the opinion is not to be followed. Further, the matter of preshift and postshift overtime has been considered by the Court of Claims in Baylor v. United States, 198 Ct. Cl. 331 (1972). There, the Court aggregated the total preshift and postshift work performed in order to determine the amount of overtime to be paid

each workday. This procedure has consistently been followed by decisions of this Office. 53 Comp. Gen. 489 (1974); Raymond A. Allen, et al., B-188687, September 21, 1977. Accordingly, in this case the periods of preshift and postshift duty should be aggregated to determine the total amount of overtime compensation properly payable.

Acting Comptroller General
of the United States